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Supreme Court of the United States

OCTOBER TERM, 1906.

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No. 199.

METROPOLITAN LIFE INSURANCE COMPANY OF NEW YORK,

PLAINTIFF IN ERROR,

VERSUS

THE CITY OF NEW ORLEANS, THE BOARD OF ASSESSORS FOR THE PARISH OF ORLEANS AND JOHN FITZPATRICK, STATE TAX COLLECTOR,

DEFENDANTS IN ERROR.

In Error to the Supreme Court of the State of Louisiana.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

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PLEADINGS AND EVIDENCE.

We deem it unnecessary to repeat here the pleadings and evidence in this cause, as they are correctly cited on pages 4 and 5 of our opponent's brief, except to call the

particular attention of the Court to the fact that these loans were made in the City of New Orleans to the policy-holders of the company, plaintiff in error, by the agent of the company in New Orleans, subject to the approval of the company at its domicil in New York. When these loans were approved by the company at its domicil, the notes were given by the borrowers to the agent in New Orleans and forwarded by the agent to the company at its domicil in New York. When interest became due on these notes, it was paid to the agent in New Orleans and forwarded to the home office in New York, and when the notes fell due they were forwarded from the home office to the agent in New Orleans, who collected from the borrower and surrendered the note to him.

It was contended by the plaintiff in error that, under these circumstances, the notes were not taxable in Louisiana as credits. The trial Court sustained this contention, and ordered the cancellation of the assessment and tax on these notes or credits. From the judgment of the lower Court defendants in error appealed to the Supreme Court of Louisiana, and that Court reversed the decision of the lower Court in an able and lengthy opinion, found on pages 24, 25, 26, 27, 28, 29, 30, 31, 32 and 33 of the record herein. After said decision, plaintiffs in error applied for a rehearing, which was refused. (See page 34.) From that judgment the present writ of error is taken to this Honorable Court.

The Supreme Court of the State of Louisiana having decided that there was nothing in the Constitution and

laws of the State of Louisiana opposed to the taxing of these notes, we take it, as too well settled by a long line of decisions of this Honorable Court, that on this question your Honors will not go behind the decision of the highest Court of the State upon this point.

As was said by Mr. Justice Brewer in a very recent case (*Michigan Central Railroad vs. Powers*, 201 U. S. 291):

> "The unconstitutionality of a statute may depend upon its conflict with the Constitution of the State, or with that of the United States. If conflict with the State Constitution is the sole ground of attack, the Supreme Court of the State is the final authority (*Merchants' Bank vs. Pennsylvania*, 167 U. S. 461, and cases cited in the opinion), while in the other case the ultimate decision rests with this Court."

It, therefore, seems unnecessary for us to reply to that portion of the argument which is embraced in pages 14 to 27 of our opponent's brief. While it is true that in the cases, 44 La. An. 760, 765, *Clason & Co. vs. City of New Orleans;* 46 La. An. —; 51 La. An. 1028, and 115 La. An. 563, the Court still held to the illegality of the taxation of credits not represented by notes or other written evidences of indebtedness, and not permanently present in the State of Louisiana, yet those decisions were based on the former decisions under the Statute of 1888, for, in 51 An., they say, on page 1034:

> "The revenue law enacted in 1888 is substantially the same, and so not less broad in its scope than the Act of 1890."

The Court overlooked the fact in these two decisions that the Statute of 1890 and the present Statute of 1898, in Section 7, Act 170 of 1898, contain the following provision:

> "And this shall apply with equal force to any person or persons representing, in this State, business interests that may claim a domicil elsewhere, the intent and purpose being that no non-resident, either by himself or through an agent, shall transact business here without paying to the State a corresponding tax with that exacted of its own citizens; and all bills receivable, obligations or credits arising from the business done in this State are hereby declared assessable within this State, and at the business domicil of said non-resident, his agent or representative."

This clause was first introduced in the Act of 1890, amending the Act of 1888, in order to correct a deficiency in the Act of 1888. Indeed, the Supreme Court of Louisiana had, in 41 An. 646, said that it was within the power of the Legislature, in regard to judgments, to make them taxable at the domicil of the debtor, declaring that, "in absence of legislative provisions to the contrary, judgments, like debts, have their *situs* at the domicil of the creditor," thus suggesting, as it were, the necessity of legislative action to make debts taxable at the domicil of the debtor. The decision of the Supreme Court in this case corrects that error, and the Court in its opinion (page 21) meets the question fairly and squarely by declaring that these notes under the clause of the act which

we have cited are taxable in the State of Louisiana, and says, on page 30:

> "The evident object of the statute was to do away with the discriminiation theretofore existing in favor of non-residents and against residents and place them on an equal footing."

So while it is true that the Supreme Court of Louisiana has not always adhered to the position so unequivocally assumed by it in the instant case, that fact cuts no figure in the present aspect of the litigation. It is clear beyond all possibility of doubt that the Supreme Court of Louisiana recognized in its opinion in this cause the right of the State of Louisiana to tax the property of non-residents doing business in this State in the manner set forth in this record. That view, as the last expression of the State's highest tribunal, will be regarded as controlling by this Court, whose province is not to reconcile or differentiate apparently conflicting decisions of a State Court. This Court accepts as correct and as final the interpretation put upon a particular State statute in a given case, regardless of past deviations in the jurisprudence of the State. Such was the policy of the Supreme Court of the United States as declared in the recent case of *Cohen vs. Brewster*, No. 91, October term, 1906 (not yet reported), where conflicting Louisiana decisions were invoked to overturn the decision of the Supreme Court of Louisiana on a tax matter, and where this Court held that it would go no further than the case at bar to ascertain

what was the law of Louisiana on the subject-matter under consideration.

Your Honors, in *Blackstone vs. Miller,* 188 U. S. 189, and *Washington County vs. Bristol,* 177 U. S. 133, to which we need not refer at length, have affirmed the power of State taxation of notes which were given in the State and were payable in the State, although the notes were held in New York until such time as it became necessary to collect or renew them. This was done by forwarding the notes back to the agent in the State which was the domicil of the debtor.

The only question, therefore, which we think is properly before this Court, is whether the taxation of these notes under these statutes offends against the Fourteenth Amendment of the Constitution of the United States. The application of that amendment to matters of State taxation has been repeatedly passed upon by this Court, and its general attitude upon the subject is summed up in one of its last utterances. Said the Court in *Michigan Central Railroad vs. Powers,* quoted above (201 U. S. 93):

> "We have had frequent occasion to consider questions of State taxation in the light of the Federal Constitution, and the scope and limits of national interference are well settled. There is no general suprvision on the part of the nation over State taxation, and in respect to the latter the State has, speaking generally, the freedom of a sovereign, both as to objects and methods. It was well said by Judge Wanty, delivering the opinion of the Circuit Court

in this case: 'There can at this time be no question, after the frequent and uniform expressions of the Federal Supreme Court, that it was not designed by the Fourteenth Amendment to the Constitution to prevent a State from changing its system of taxation in all proper and reasonable ways.' * * * It is enough that there is no discrimination in favor of one as against another of the same class, and the method for the assessment and collection of the tax is not inconsistent with natural justice."

We have already cited *Blackstone vs. Miller* and *Washington County vs. Bristol,* in both of which cases your Honors have decided that taxation under the circumstances disclosed by this record does not offend against the Fourteenth Amendment. We submit, further, that the record in this cause shows that the assessment herein assailed meets the criterion set up by this Court, when, speaking through Mr. Justice Brown, it declared, in *Union Transit Company vs. Kentucky,* 199 U. S. 194, that "the power of taxation is exercised upon the assumption of an equivalent rendered in the protection of the property and person of the taxpayer." The plaintiff in error has an agent in Louisiana, through whom it makes loans to citizens of Louisiana, and obtains written evidences of such loans, which obligations are enforceable solely under the laws and in the Courts of that State. The temporary absence of these evidences of debt from the State of Louisiana does not deprive that State of its right to impose a tax on these obligations. They arise from business done in this State, and, in return for the

tax, the owner secures an equivalent in the protection accorded to his property by the laws of Louisiana.

Again, the property is not PERMANENTLY out of the State. When the loan is discharged by payment, the note evidencing same is returned to the Louisiana agent, who surrenders it to its maker and accepts payment therefor in Louisiana. Thus one element emphasized by this Court in many decisions, and notably in *Delaware Co. vs. Penna.*, 198 U. S. 341, as making for the unconstitutionality of assessments of this nature, is lacking in the instant case. The property is not permanently out of the State, but only absent temporarily, "from motives of convenience or design," and is accordingly subject to the taxing power of the State.

We have thus far argued this case on the principle which would apply to private persons holding the notes, non-resident within the State.

Even if it were granted, however, that our contention hitherto made could not be sustained, and that the doctrine of *mobilia sequuntur personam* could not be abolished by positive statute, in so far as non-resident persons or individuals are concerned, then there is another principle which entirely differentiates the case of foreign insurance companies doing business in the State.

It has been uniformly decided that a State has a right to entirely exclude a foreign insurance company from doing business within its borders, or that it can impose such taxation as it sees fit.

One of the latest and most thorough treatises on the law of taxation lays down the doctrine as follows:

"With exceptions hereafter indicated, relating to cases where foreign corporations are engaged in interstate commerce, or to cases where they are agencies of the United States, and to other special cases elsewhere considered, the Federal Constitution imposes no restraint upon the States in regard to taxation of foreign corporations, but the rule is that the States have the right to exclude them entirely, they have the power to impose upon them such burdens as the conditions of their entering as they may see fit; and these burdens or impositions may as well take the form of a taxation at a greater rate or upon a different principle from that applicable to domestic corporations as any other. When, therefore, the foreign corporation is of such a character—as, for instance, an insurance company, and consequently not engaged in interstate commerce—that the State has the power to exclude it altogether, it is under no Federal restraint in respect of this power of taxation over it. As a foreign corporation is not, within the domestic State, entited to the *privileges* and *immunities of citizens of other States*, within the meaning of the Federal Constitution, it cannot demand, under that Constitution, that it shall be taxed at the same rate and on the same principles as corporations of the domestic State."

Thompson's Commentaries on Corporations, Sec. 8087, Vol. 6, and prior sections and authorities there referred to. The italics are the author's.

"*Foreign corporations when deemed persons.* * * * They are also deemed persons within the

meaning of a statute relating to *taxation*, unless a different intent is indicated in the statute."

Thompson's Commentaries on Corps., Vol. 6, Sec. 7900, authorities in note 31 N. Y. 32; 18 Abb. Pr. (N. Y.) 118; 28 How. Pr. (N. Y.) 41. The italics are the author's.

In support of this principle, Cook on Corporations, Vol. 12, 4th Ed., p. 1080, among other authorities which we will discuss later on in this brief, has the following in note 4:

"A tax on manufacturing corporations to the extent of the business which they do in the State is constitutional and enforceable. (131 N. Y. 64; also 10 Wall. 66; 133 N. Y. 323; 143 U. S. 305; 134 U. S. 594; 52 N. J. L. 308; 44 Fed. Rep. 24; 141 N. Y. 118, and a multitude of other authorities.)"

"Foreign insurance companies may be required to pay a tax as a condition of doing business in the State, even if home companies are not taxed, or are taxed by a different standard. The tax is not a regulation of commerce. Notwithstanding the insurance company is taxed, its agents may also be required to pay a license fee as such."

Cooley on Taxation, p. 387, and authorities in notes 2 and 3; 48 Ill. 172; 32 Nev. 424; 10 Wall. 410; 34 N. J. 479; 35 N. J. 574; 85 Penn. St. 513; 94 Ill. 364; 104 Ill. 653; 8 Wall. 168; see, also, Desty on Taxation, Vol. 1, p. 372; *Ibid.*, p. 229.

Burroughs on Taxation, p. 151, in treating of taxation on foreign corporations, says:

"While it may be true, as a matter of principle, that taxation should be laid for the purpose of revenue by an equal and uniform mode, yet, what shall

be the subjects of taxation, the mode and the rate are in the discretion of the Legislature in the absence of express constitutional limitation on the subject of taxation, a discretion which has no limitation, except that its exercise shall not abridge any of the private rights of person or property secured by the Constitution."

This doctrine was maintained in *Paul vs. Va.*, 8 Wallace, 168, in which case the State of Virginia had laid a discriminating tax on foreign insurance companies doing business in that State at a greater rate than on her own domestic insurance companies.

The Court sustained the State law, and decided that the business of insurance was not commerce or interstate commerce, and that a State had the right to impose any tax upon a foreign insurance company doing business in its State it deemed proper.

This was in regard to a license tax. In 10 Wallace, 573, they held similarly in respect to a law of Massachusetts which imposed a tax of one per cent. on the premiums received in Massachusetts by insurance companies incorporated under the laws of Massachusetts; two per cent. on all premiums received by the companies incorporated under the laws of the other States in the Union, and four per cent. on all premiums received by companies doing business in the State, and chartered under the laws of countries other than the United States. In that decision the Court said, referring back to the case of *Paul vs. Virginia:*

"That corporations created by a State could exercise none of the functions or privileges conferred by

its charter in other States of the Union, except by the comity and consent of the latter.

"This proposition disposes of the case before us. Plaintiff is a foreign corporation, and it is conducting business in the State of Massachusetts."

The case is more fully reported in 100 Mass. 531, and see, also, 99 Mass. 148.

The doctrine was held in 10 Wallace, 415, in a license case similar to *Paul vs. Virginia.* In 94 U. S. 535, the same doctrine was announced in a license case. In 96 U. S. 12, it was held that the right of the State to tax corporations in this manner, when engaged in interstate commerce, did not exist.

So in 113 U. S. 739, the Court said:

"The right of the people of a State to prescribe generally by its Constitution and laws the terms upon which a foreign corporation shall be allowed to carry on its business in the State has been settled by this Court. (*Bank of Augusta vs. Earle,* 13 Pet. 519; *Paul vs. Virginia,* 8 Wall. 168; *Ducat vs. Chicago,* 10 Wall. 410.)"

In 120 U. S. 496, a tax of the State of Tennessee on foreign drummers was declared unconstitutional because it violated the interstate commercial clause, but the Court said that the right of the State to tax foreigners doing business in the State was limited "only in those cases in which the States themselves, as well as individual citizens, are subject to the restraints of the higher law of the Constitution." The same was held in 127 U. S. 640, in

drummer tax was held in 128 U. S. 129, unconstitutional, as interfering with the commerce clause. The same was held in 129 U. S. 147.

In 143 U. S. 22, the Court said:

> "The old rule expressed in the maxim of *mobilia sequuntur personam*, by which personal property was regarded as subject to the law of the owner's domicile, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used,"

and cites five prior decisions of the United States Supreme Court and Story and Wharton's Conflict of Laws, already quoted by us. The Court had just said:

> "No general principles of law are better settled, or more fundamental, than that the legislative power of every State extends to all property within its borders, and that only so far as the comity of that State allows can such property be affected by the law of any other State."

In 143 U. S. 314, the Court said:

> "Nor can there be any greater objection to a similar tax upon a foreign corporation doing business by its permission within the State. As to a foreign corporation—and all corporations in States other than the State of their creation are deemed to be foreign corporations—it can claim a right to do business in another State, to any extent, only subject to the conditions imposed by its laws."

In 165 U. S. the Supreme Court sustained a State tax on the proportion of capital of a non-resident express company, which its property in Ohio represented, and "that the distribution among the several counties is a matter of State regulation."

In 166 U. S. 154, the Court again said:

> "The tax in controversy was nothing more than a tax on the intangible property of the company in Kentucky, and was sustained as such by the Court of Appeals, as consistent with the provisions of the Constitution of Kentucky, in reference to taxation. And for the reasons given, and on the authorities cited in *Adams Express Co. vs. Ohio State Auditor*, 165 U. S. 194, we are unable to conclude that the method of taxation prescribed by the State of Kentucky and followed in making this assessment is in violation of the Constitution of the United States."

In the fuller statement of the case (p. 156), by the dissenting Judges, it is said that the tax statute includes "the tangible property of such corporations, which property—that is, the intangible property—whether situated in or out of the State, shall be considered and estimated in fixing the value of the corporate franchises."

In a very recent case, *Parke, Davis & Co. vs. Comptroller of New York*, the Supreme Court of the United States sustained a State tax on the business and franchise of a Michigan corporation manufacturing drugs in the City of Detroit, but doing business in the City of New York.

In that case the Court said:

> "It must be regarded as finally settled by frequent decisions of this Court that, subject to certain limitations as respects interstate and foreign commerce, a State may impose such conditions upon permitting a foreign corporation to do business within its limits as it may judge expedient; and that it may make the grant or privilege dependent upon the payment of a specific license tax or a sum proportioned to the amount of its capital used within the State. (*Paul vs. Virginia*, 8 Wall, 168; *Horn Silver Mining Co. vs. New York*, 143 U. S. 305.)"

This doctrine was also fully sustained in the decision of the Supreme Court of the State of Louisiana, in the cause at bar, in the following language:

> "It is not contested that the State has the right, in consenting to allow foreign corporations to carry on business within her borders, to attach such conditions to such consent as she pleases. These foreign corporations are under no obligation to accept the terms; but, if they do accept them, and carry on business in the State, they must comply with them. They cannot avail themselves of the benefits of the consent and repudiate the obligations attached thereto. The conditions of consent may refer to the matter of taxation as well as to anything else. When foreign corporations come into the State for business purposes, they are constructively present in the State, and voluntarily place themselves within the jurisdiction of the State, and accept and subject themselves to the laws thereof."

As was said in *Bluefields Banana Co. vs. Board of Assessors*, 49 La. An. 43:

> "These foreign corporations doing business in Louisiana transact their business precisely as do resident business men and corporations. They derive all the advantages to be obtained from the State and city governments which residents receive, and we see no reason why they should not be taxed as claimed, unless there be insuperable legal obligations in the way."

This doctrine was approvingly quoted in *Comptoir National vs. Board*, 52 An. 1322. Taxation is a correlative of protection. The evidence in the present case established the fact that the notes referred to were signed by the borrowers in the State of Louisiana, and delivered there to the local superintendent of the company, who turned over to them in Louisiana the amount borrowed of the company.

As stated in the *Comptoir National case:*

> "The particular manner or instrumentality by which the moneys used by the company in the course of continuing its business in Louisiana was obtained was a matter of no moment or significance in the consideration of the question we are now dealing with. The company, beyond question, loaned money in Louisiana, which, for the purposes of the loan, were the company's moneys, and the borrowers gave their own notes to the company to represent the moneys received from the company. The notes represent an equivalent amount of money of the company in Louisiana. The moment these moneys were received in Louisiana, and there delivered to the com-

pany's local superintendent, the taxing power attached against the company, and, immediately after the delivery of the money to the borrowers, the tax struck the notes delivered to the superintendent in representation of the moneys, regardless of what disposition he might make of them subsequently. It is a mistake to suppose that, because the tax debtor might, in order to evade payment of the tax, or for any other reason, remove the notes beyond the limits of the State, the tax would be destroyed. An evasion would not be tolerated. It would not be necessary for the State to go beyond its limits for the enforcement of the tax against the company because the notes should have been taken out of the State. Article 233 of the Constitution declares: 'Taxes on movables shall be collected by seizure and sale by the Tax Collector of the movable property of the delinquent to pay the tax. Sale of such property shall be made at public auction without appraisement, after ten days' advertisement made within ten days. If the Tax Collector can find no corporeal movables of the delinquent to seize, he may levy on corporeal rights by notifying the debtor thereof, or he may proceed by summary rule in the Courts to compel the delinquent to deliver up for sale property in his possession or under his control.' ''

This doctrine seems now to be universally recognized. A recent work (Gray on the Limitations of Taxing Power and Public Indebtedness, Sec. 87, p. 69) says:

> "Persons are not permitted to avail themselves for their own benefit of the laws of a State in the conduct of business within its limits, and then to escape their due contribution to the public needs through action of this sort (sending the notes out of the State), whether taken for convenience or by design."

A number of cases are cited in the note in support of the doctrine, and in Section 88 of the same work it is said:

> "In a Pennsylvania case, the fact that the property was employed in business in the State was regarded as the controlling feature of jurisdiction."

And, again, under Section 98, page 76, the same author says:

> "Although in nearly all the cases which have been referred to there was some physical evidence of the credits in the State upon which the Courts rested the jurisdiction, yet the real element in most of those cases was that the property taxed was *used in business in the State.*"

And in the same section the author says:

> "This principle leads up to the conclusion that capital of a non-resident, kept in a State for investment and reinvestment, is taxable in that State, no matter in what form it is—regardless of how the credits in which *that capital is invested are evidenced, and regardless of where the evidences are.*" (The italics are Mr. Gray's.)

In regard to the taxation of foreign corporations, the same author (Gray) says, on page 44, Section 57:

> "A foreign corporation can only come into a State and do business there by consent of the State; and the charge imposed by the State as a condition of that consent is not, ordinarily, a tax on property: although it is conceivable, of course, that some tax on property might be imposed as such a condition."

And in the notes (55 and 56) to the text a number of cases are cited from the various States in which the tax on foreign corporations has been sustained as a property tax.

We think that, by all these authorities, we have abundantly established the principle that a foreign corporation, such as the plaintiff in error here, doing business in Louisiana, and loaning money therein, and taking notes therefor, is not only properly taxable under the Constitution and laws of Louisiana, but that the assessment and taxation of the notes thus taken in the business do not offend against the Fourteenth Amendment to the Federal Constitution, nor any principle of equity or justice. For the tax law of Louisiana does not seek to impose on non-residents or foreign corporations doing business in the State any heavier burden than that borne by its own citizens and residents, thus liberally placing non-residents and foreign corporations on precisely the same basis as its own citizens in paying their proportion of the tax for their protection in their business.

All of which is respectfully submitted.

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